IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 95-236-A**
	)	
EXOLON-ESK COMPANY,	)	**Violation: 18 U.S.C. § 1001**
WILLIAM H. NEHILL	)	
	)	
Defendants.	)	

UNITED STATES' PRETRIAL MEMORANDUM OF LAW

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I. INTRODUCTION

On May 16, 1995, a federal grand jury in the Eastern District of Virginia returned an indictment charging defendants Exolon-ESK Co. ("Exolon") and William H. Nehill ("Nehill") with making a false statement in a bid submitted to the Defense Logistics Agency ("DLA"), an agency within the Department of Defense, in violation of 18 U.S.C. § 1001. This memorandum addresses the legal issues and discusses evidentiary issues that may arise at trial.

II. LEGAL ISSUES

A. The Government Must Prove Beyond a Reasonable Doubt Three Elements to Establish a Violation of 18 U.S.C. § 1001.

The Fourth Circuit recently has held that in order to establish a violation of 18 U.S.C. § 1001 the Government must prove: (1) that the defendant made a false statement to a governmental agency, or concealed a fact from it, or used a false document knowing it to be false; (2) that the defendant acted knowingly and willfully; and (3) that the false statement or concealed fact was material to a matter within the jurisdiction of the agency. See United States v. Arch Trading Co., 987 F.2d 1087, 1095 (4th Cir. 1993); United States v. Norris, 749 F.2d

1116, 1122 (4th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); United States v. Seay, 718 F.2d 1279, 1283 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984)(quoting United States v. Race, 632 F.2d 1114, 1116 (4th Cir. 1980)).

B. The Government May Prove The First Element, Making or Using a False Statement, Through Proof That Defendants Submitted to the DLA a Bid Containing a False Certification.

On its face, Exolon's bid entitled "Sale of Government Property Negotiated Sales Contract," signed and submitted to DLA by Nehill on behalf of defendant Exolon, and dated October 21, 1994 ("Exolon Bid," attached herein as Exhibit A), is false.[1/] The Exolon Bid certifies that, at the time of its submission, neither Exolon nor any of its principals were under indictment for several listed offenses, including "falsification or destruction of records," and "making false statements." (Exolon Bid § I.4.a.(1)(i)(B)). Earlier that year, however, a federal grand jury in the Western District of New York indicted Nehill with obstructing justice in the following ways:

> (a) directing others to destroy documents responsive to the subpoena duces tecum; (b) withholding from production to the grand jury documents responsive to the subpoena duces tecum; (c) concealing the destruction and withholding of documents responsive to the subpoena duces tecum; and (d) falsely stating in two affidavits signed and sworn before a Notary Public, that he had produced on behalf of Exolon-ESK Company all documents responsive to the subpoena duces tecum."

(Indictment from the Western District of New York dated Feb. 11, 1994 ("W.D.N.Y. Indictment") herein attached as Exhibit B, ¶ 30.) Since the certification states that no principal[2/]

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[1] At the time he signed and submitted the false bid to the DLA, Nehill was Exolon's Executive Vice President, Treasurer and Secretary.

[2] Under the terms of the DLA Solicitation, "Principals" included "officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary division, or business segment, and similar positions)." (DLA Solicitation § I.4.a.(2).)

was under indictment, and Nehill was at the time a principal and under indictment, the documents demonstrate that the certification is false.

C. The Government May Prove the Second Element, the Requisite Mental State, Through Proof That Defendants Acted With Reckless Disregard for the Truth and a Conscious Purpose to Avoid Learning the Truth.

To satisfy its burden, the Government need not demonstrate that defendants had the specific intent to violate 18 U.S.C. § 1001. See United States v. Daughtry, 48 F.3d 829, 832 (4th Cir. 1995), petition for cert. filed, No. 94-9473 (May 30, 1995). Rather, the Government must prove that defendants acted with reckless disregard for the truth or falsity of the statement and with a conscious purpose to avoid learning the truth or falsity of the statement.

In United States v. Greenberg, No. 87-5089, 1988 WL 21229 (4th Cir. Mar. 8, 1988), cert. denied, 488 U.S. 819 (1988),[3/] the Fourth Circuit unambiguously upheld former Chief District Judge Bryan's jury instruction on intent in a Section 1001 case, which read: "Knowledge of falsehood may be inferred from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him or where the defendant's conduct comprises a reckless disregard for the truth with a conscious purpose to avoid learning the truth." The Fourth Circuit has adopted this standard in other false statements cases. See United States v. Fowler, 932 F.2d 306, 317-18 (4th Cir. 1991)(holding "reckless disregard" sufficient to prove scienter in a mail fraud case); United States v. Spillane, 913 F.2d 1079, 1082 (4th Cir. 1990)(holding that "reckless disregard for the truth satisfies the scienter element of [18 U.S.C. § 922(g)(2), making false statements to a licensed firearms dealer]").

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[3] The Greenberg opinion is unpublished. However, the Government submits that the circumstances surrounding the Greenberg opinion make it singularly applicable to the instant matter. Therefore, pursuant to 4th Cir. I.O.P. 36.6, the Government cites Greenberg and has attached to this brief a copy of that disposition.

Other circuits also have adopted the reckless disregard standard in Section 1001 cases. See, e.g., United States v. Puente, 982 F.2d 156, 159 (5th Cir. 1993), cert. denied, --- U.S. ---, 113 S.Ct. 2934 (1993)(cited in United States v. Shah, 44 F.3d 285 (5th Cir. 1995)(holding that where defendant was familiar with government contracting procedures and supplied information and his signature at various points throughout the contract, the jury could find that defendant "knowingly" made the false statement therein)); Arthur Pew Constr. Co. v. Lipscomb, 965 F.2d 1559, 1576 (11th Cir. 1992), appeal after remand, 965 F.2d 1559 (1992); United States v. Jewell, 532 F.2d 697 (9th Cir. 1976), cert. denied, 426 U.S. 951 (1976); United States v. Thomas, 484 F.2d 909, 912-13 (6th Cir. 1973), cert. denied, 414 U.S. 912 (1973); United States v. Abrams, 427 F.2d 86, 91 (2d Cir. 1970), cert. denied, 400 U.S. 832 (1970).

Based on facts very similar to the instant case, the Fifth Circuit found that sufficient evidence of intent existed to convict defendants under §1001. Puente involved principals of a private company which bid on a contract partially administered by a United States department -- specifically, a housing project administered by the Department of Housing and Urban Development. The defendants signed and submitted a required "Certification" form, certifying that neither of them had ever been convicted of a felony. In truth and fact, the defendants each had a previous felony conviction. Puente, 982 F.2d at 158. On appeal, one defendant argued that he had never read the form he signed, and that the Government had offered no proof that he knew what he was signing. The district court concluded, however, that the defendant acted with "a reckless disregard for the truth and with the purpose to avoid learning the truth." Puente, 982 F.2d at 159. The Fifth Circuit affirmed:

> "Reckless indifference" has been held sufficient to satisfy § 1001's scienter requirement so that a defendant who deliberately avoids learning the truth cannot circumvent criminal sanctions. (citations omitted.) Likewise, a defendant who deliberately avoids reading the form he is signing cannot avoid criminal sanctions

> for any false statements contained therein. Any other holding would write § 1001 completely out of existence.

Puente, 982 F.2d at 159. See also Shah, 44 F.3d at 295 (where defendant was familiar with the bidding process and the forms involved, where information was supplied above and below the certification in question, and where the defendant had signed the document, the jury could infer beyond a reasonable doubt that the defendant read and understood what he submitted).

D. The Government May Prove the Third Element, Jurisdiction and Materiality, Through Defendants' Stipulations and Proof that the DLA Received The Exolon Bid.

The third element of the offense requires the Government to prove that "the false statement or concealed fact was material to a matter within the jurisdiction of the agency" to which it was sent. See Arch, 987 F.2d at 1095. Defendants are entitled to a jury determination of every element of the offense with which they are charged. See United States v. Gaudin, No. 94-514, 1995 WL 360212, *3-*4 (U.S. June 19, 1995). However, the defendants have stipulated that:

> The Department of Defense is a "department" of the United States, and the Defense Logistics Agency and its subunit, the Defense National Stockpile Center, are "agencies" of the United States, within the meaning of 18 U.S.C. §1001. Statements contained in certifications submitted by defendants Exolon-ESK Company and William H. Nehill as part of their October 21, 1994 bid proposal for Aluminum Oxide Fused Crude, are matters within the jurisdiction of a department or agency of the United States, within the meaning of 18 U.S.C. §1001.

(Stipulations of Exolon-ESK Co. dated June 27, 1995 ["Exolon Jurisdiction Stipulation"] ¶ 1, and of William H. Nehill dated July 6, 1995 ["Nehill Jurisdiction Stipulation"] ¶ 1, attached hereto as Exhibit C.) These stipulations track the language of Section 1001 and prove the jurisdictional requirements of the third element.

As to materiality, a statement is material if it has a natural tendency to influence, or be capable of influencing, the decision of the decisionmaking body to which it is addressed. See Gaudin, 1995 WL 360212 at *3-4; Norris, 749 F.2d at 1121. To prove materiality, the Government must show that the Exolon Bid, and the false statement in it, were capable of influencing the DLA -- not that the DLA suffered financial loss. See United States v. Gilliland, 312 U.S. 86, 93 (1941). Specifically the Government must prove that Exolon sent the Bid to DLA, that DLA received the Bid, and that the Bid tended to influence DLA's decision to award a contract.

III. CORPORATE LIABILITY

Exolon is culpable under Section 1001 because, as Nehill's grand jury testimony reveals, Exolon authorized him to submit the bid to DLA on Exolon's behalf. A corporation is liable for crimes committed by its employees where: (1) the employee was, in committing those crimes, acting within the scope of his authority, or apparent authority, and (2) the employee committed those crimes with the intent to benefit the corporation, even if such acts were against corporate policy or express instructions. See Mylan Lab. v. Akzo, N.V., 2 F.3d 56, 63 (4th Cir. 1993); United States v. Gallagher, 856 F.Supp. 295, 297-98 (E.D. Va. 1994).

In United States v. Basic Constr. Co., 711 F.2d 570 (4th Cir.), cert. denied, 464 U.S. 956 (1983), the Fourth Circuit held that a corporation may be held criminally responsible for criminal violations of its employees if those employees were acting within the scope of their authority and for the benefit of the corporation, even if the employee's acts were against corporate policy or express instructions. Basic, 711 F.2d at 573 (quoted in United States v. Automated Medical Lab., 770 F.2d 399, 406 (4th Cir. 1985). In Automated Medical, the Fourth Circuit affirmed the conviction of defendant corporation under Section 1001, stating:

> We believe that [Basic] states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust laws. . . . The rule set forth in [Basic] is also consistent with the following general rule described in [Old Monastery Co. v. United States 147 F.2d 905, 908 (4th Cir.), cert. denied, 326 U.S. 734 (1945)] [that a] corporation may be held criminally responsible for acts committed by its agents, provided such acts were committed within the scope of the agents' authority or course of their employment.

Automated Medical, 770 F.2d at 407. According to his grand jury testimony, Nehill received approval from the Board of Directors to purchase DLA material, and signed the Exolon Bid as the person so authorized by the Offeror. (Grand jury transcript of William H. Nehill dated May 16, 1995 ("Nehill Transcript") at 18-20.) In doing so, Nehill acted with no intent contrary to the interests of Exolon, or to exclusively benefit a party other than Exolon. As Nehill was acting for the benefit of Exolon, corporate liability attaches. See Gallagher, 856 F. Supp. at 298.

IV. AIDING AND ABETTING

Even if the jury finds Nehill not liable as a principal, they may convict him as an aider and abettor.[4/] 18 U.S.C. §2 provides, in pertinent part: "Whoever commits an offense against the United States or aids or abets or counsels, commands or induces, or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a) (1995). This statute "makes clear the legislative intent to punish as a principal not only one who directly commits an offense and one who 'aids, abets, counsels, commands, induces or procures' another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States." 18 U.S.C. § 2 historical and statutory notes.

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[4] An indictment need not specifically charge a defendant with aiding and abetting in order for that defendant to be convicted on that charge. Pigford v. United States, 518 F.2d 831, 834 (4th Cir. 1975). "An individual ... may be indicted as a principal for the commission of a substantive crime and convicted upon evidence that he or she aided and abetted only." United States v. Walser, 3 F.3d 380, 388 (11th Cir. 1993).

The Fourth Circuit has stated that "[s]imply put, '[a]iding and abetting means to assist the perpetrator of the crime.'" United States v. Horton, 921 F.2d 540, 543 (4th Cir 1990)(quoting United States v. Williams, 341 U.S. 58, 64 (1951)). The Government need only show "that the crime was committed by someone and that the person charged aided and abetted its commission," -- not demonstrate "that the principal be convicted or even, in fact, identified." United States v. Salerno, 330 F. Supp. 1401 (M.D. Pa. 1971). While Exolon submitted the Bid to the DLA, it was Nehill who signed and sent it on Exolon's behalf. By these actions, Nehill aided and abetted Exolon in the submission of a false statement to the Government.

V. EVIDENTIARY ISSUES

A. The Government's Documentary Exhibits Are Admissible.

Counsel for Exolon and Nehill have agreed to stipulate to the admissibility of the following documents: (1) the Exolon Bid (Exhibit A); (2) "Contract Number DL-00-DS-(S)-51026" ("DLA Contract Award," attached herein as Exhibit D); and (3) "MIN-046 Solicitation of Offers for Aluminum Oxide, Fused Crude ("DLA Solicitation," attached hereto as Exhibit E). In addition to these documents the Government seeks admission of one additional document, to whose admissibility Defendants decline to stipulate, two stipulations and one affirmation.

1. The DLA Solicitation

The DLA Solicitation shows that the DLA extended an offer to Exolon to bid on Government materiel and required bidders to certify that neither they nor their principals were under indictment. Defendants already have stipulated to its admissibility.

2. The Exolon Bid

The Exolon Bid demonstrates that Exolon, through Nehill, submitted a document containing a false statement to the Government. Defendants already have stipulated to its admissibility.

3. The DLA Contract Award

The DLA Contract Award shows that the DLA received and relied on the Exolon Bid. Defendants already have stipulated to its admissibility.

4. The W.D.N.Y. Indictment

This Court already has declared that there is no surplusage in the Indictment, and that there is no reason to strike any portion of it, including the references to the allegations in the W.D.N.Y. Indictment. Transcript of motion proceedings at 7, United States v. Exolon, Crim. No. 95-236-A (E.D. Va. July 7, 1995)(order denying motion to strike material from the indictment). Specifically, the Indictment is relevant under Rule 401-02 because it tends to prove the falsity of the certification in the Exolon Bid, and tends to prove both the existence of motive for Nehill to submit the Exolon Bid with the false certification, and that Nehill knew the statement was false when he submitted the Exolon Bid to Exolon. The indictment is not hearsay, as it would not be submitted to prove the truth of any matter asserted therein. It merely states the charge of the grand jury and, by its nature, shows that Nehill was under indictment in October 1994.

5. Defendants' Stipulations

The Nehill Affirmation stipulates that defendant Nehill signed the Exolon Bid. It authenticates the Exolon Bid and tends to prove that Nehill executed the Exolon Bid on behalf of

Exolon. The Affirmation is not hearsay under Fed. R. Evid. 801(d)(2)(A) because it is Nehill's own statement.[5/]

The Jurisdiction Stipulations of defendants Nehill and Exolon state that the DLA is an agency within the meaning of Section 1001 and that the statements in the Exolon Bid were "matters within the jurisdiction of a department or agency of the United States within the meaning of 18 U.S.C. § 1001." They tend to prove that the false statement was material to a matter within the jurisdiction of a department or agency of the United States, and they are not hearsay under Rule 801(d)(2)(A) because they are the defendants' own statements.

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[5] It is also admissible against Exolon under Fed. R. Evid. 801(d)(2)(D), in that it is a statement made by an agent of Exolon's concerning a matter within the scope of his agency or employment. It does not matter that the statement was made after Nehill's active employment with Exolon had ceased. See Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958); Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines v. Tuller, 292 F.2d 775, 784 (D.C. Cir. 1961); Martin v. Savage Truck Lines, 121 F. Supp. 417 (D.D.C. 1954). Moreover, Nehill has not asserted that his employment has been terminated, but rather that he is on an indefinite "leave of absence." (Nehill Transcript at 4.) In the words of Ms. Shawn Howard, Exolon's representative at the grand jury, "[h]e's still paid by the company but he does not any longer work for us." (Grand jury transcript of Shawn Howard dated May 16, 1995, at 17.)